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In the Supreme Court of the United States

October Term, 1953

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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Respondent petitions for hearing or, in the alternative, for clarification of the opinion for the reasons herein stated.

The opinion of the Court disposes of this case on the basis of its decision in *Tilton v. Missouri Pac. R. Co.*, decided the same day. Respondent does not now ask any reconsideration of the *Tilton* decision. Neither is reconsideration sought of the holding that *Tilton* disposes of the questions in this case dealing with the automatic character of the advancement from apprentice to journeyman, and of the legal effect of various uncertainties relating the advancement.

However, there remains an important question that the Court does not purport to resolve in either *Tilton* or this case. That is, whether the point seniority system historically characteristic of the railroad shop crafts is now so emasculated by the requirements of the Universal Military Training and Service

Act that it has ceased to afford the very protection that was its fundamental purpose.

The effect, although perhaps not the intent, of the decision in this case is to permit petitioner to transfer seniority from one point of employment to another. This is a right denied all other employees (Rule 15, R. 61). If petitioner has this right, then the intended protection of the point seniority system has been lost by all employees, veteran and non-veteran alike.

It is undisputed that Brooks was transferred to the North Little Rock shops on July 25, 1955 as a result of the exercise of managerial discretion (R. 32). This discretion was exercised *after* his return from military service, as distinguished from exercise of the managerial discretion involved in *Tilton* prior to the entry of those petitioners into military service. Under the terms of the collective bargaining agreement, petitioner could have brought no seniority with him on transfer (Rule 15, R. 61). The seniority of all employees covered by the agreement was confined to the point and seniority subdivision where they were employed (Rule 25 (a), R. 62).

In operation, the point seniority system permitted a journeyman machinist seeking employment to look at the journeyman's seniority roster at the North Little Rock shops and know exactly who would be ahead of him. He could make a discriminating choice between going on the bottom of that roster, or going on the bottom of the roster at some other point. He would be secure in knowing that once on that roster, no other machinist could ever "jump" him.

This "point" system of seniority is historically characteristic of the railroad shop crafts. (R. 44). It is vitally important

to the employees in this industry of declining employment opportunities (Brief Amicus Curiae, Railway Employees' Department, AFL-CIO, p. 8). In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, this Court said:

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. *There is indeed no suggestion that Congress sought to sweep aside the seniority system.* What it undertook to do was to give the veteran protection within the framework of the seniority system * * *". (emphasis supplied)

If the Act now affords to veterans the right to transfer the retroactive seniority they acquire pursuant its terms, then the devastating effect on the point seniority system is easily demonstrated. A journeyman machinist seeking employment must not only consult the journeyman's seniority roster at any point to determine the relative security it would offer him. He must also study the apprentice rosters at that point and determine whether any are veterans, and then must calculate the amount of retroactive seniority that will probably be credited to those veteran apprentices upon completion of their apprenticeships. There is yet a greater vice. He must consult the apprentice rosters *of every shop on the railroad's system*, because veteran apprentices in those shops may be transferred to the shop under consideration. In that event, retroactive seniority acquired by military absence *from another shop* would enable them to "jump" him on the roster at this point upon completion of their apprenticeship.

The resulting insecurity would penalize veterans and non-veterans alike. For example, a journeyman with five years seniority (including retroactive seniority credited for military

service) at the St. Louis shops could regard a position at the bottom of the roster at the North Little Rock shops to be more advantageous because of the number and age of the journeymen employed there, and the relative prospects of the two shops respecting volume of work. On being employed at North Little Rock, his prior seniority is forfeited (R. 61). Thereafter, one or more veteran apprentices could come to North Little Rock during or following completion of their apprenticeships, and by transferring retroactive seniority acquired elsewhere "jump" him on the journeyman's roster.

Every apprentice who had acquired retroactive seniority as a result of military service could then, upon completion of the apprenticeship, go to any shop on respondent's system where there was an employment opportunity for a journeyman and "jump" two or three years on the roster immediately upon being employed.

That this Court intended no such result appears clear from the clarification of *McKinney v. Missouri Kansas-Texas R. Co.*, 357 U.S. 265 in the *Tilton* opinion. The Court said;

> "Properly read, therefore, *McKinney* holds that where advancement depends on an employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within the reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service."

The employer's discretionary choice in the instant case was exercised after return from military service. Of course, the discretion related to transfer instead of advancement, but no rational reason has been advanced that the foregoing test should not be equally applicable to both. The only decision purport-

ing to make a careful analysis of the question held that the same standard applied. *Horton v. United States Steel Corp.*, 286 F.2d 710 (5 Cir., 1961).

The Court of Appeals in the instant case found it unnecessary to pass on the transfer of seniority question because of its conclusion that the case should be reversed and dismissed on other grounds (R. 89). The question was argued to this Court (Respondent's Brief, p. 21 - 24; Petitioner's Brief, p. 29 - 30), however it is not resolved in the opinions in this case or *Tilton*. Fully aware that Petitions for Rehearing are rarely granted, respondent submits that the same grounds exist for granting such relief that prompted the Court to act in *Silver King Coalition Mines v. Conkling Mining Co.*, 256 U.S. 18, 25. There, rehearing was granted to "* * * decide the questions argued but left open by us."

Respondent respectfully submits that rehearing should be granted on the question of whether the Universal Military Training and Service Act confers upon veterans the right to transfer seniority within a point seniority system where the collective bargaining agreement specifically denies that right to all employees. In the alternative, respondent submits that the opinion of the Court should be clarified to reflect that it is without prejudice to the authority of the Court of Appeals, in proceedings on this Court's Mandate, to pass on this question that it expressly found unnecessary to decide on the original appeal.

Respectfully submitted,

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CERTIFICATE

I, Robert V. Light, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

ROBERT V. LIGHT